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Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

GROUNDS FOR REHEARING 1

CONCLUSION 5

SPECIAL CERTIFICATE 5

CERTIFICATE OF SERVICE 5

TABLE OF CITATIONS

Cases

Alexander v. Commonwealth, 212 Va. 554, 186 S.E.2d 43 (1972) 2

Davidson v. State, 251 So.2d 841 (Fla. 1971) 4

Gent v. State, 393 S.W.2d (Ark. 1965); rev. on other grounds 386 U.S. 767 (1967) 4

Gornto v. State, 178 S.E.2d 894 (Ga. 1970), cert. den. 402 U.S. 933 (1972) 4

McKinney v. State, 254 So.2d 714 (1971), cert. den. 405 U.S. 1075 (1972) 4

Miller v. California, ... U.S. ....., 13 Cr. L. 3161 (1973) 2, 3

Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972) 2

People v. Bloss, 27 Mich. App. 687, 184 N.W.2d 299 (1970), vacated on other grounds, 201 N.W.2d 806 (1972) 4

State v. Henry, 198 So.2d 889 (La. 1967), rev. on other grounds 392 U.S. 655 (1968) 4

State v. Miller, 112 S.E.2d 472 (W. Va. 1960) 4

Other Authority

§ 18.1-236.3, Code of Virginia (1950) 2

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PETITION FOR REHEARING

The Commonwealth of Virginia petitions this Honorable Court for a rehearing concerning the decision in this case rendered by this Court on June 25, 1973.

GROUNDS FOR REHEARING

This case was one of a number of cases dealing with obscenity which this Court agreed to hear in an effort to fashion some semblance of order out of the chaos which has surrounded this particular field of law during recent years.

This case arose under the civil procedure for determining obscenity pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as amended. Sub-section 8 (b) specifically provides that the "community standard" to be applied in testing obscenity is the standard of the *county* or *city* in which the proceeding is brought. In conformity with the language of this statute, the trial court applied the standards of the City of Portsmouth, Virginia, the jurisdiction in which the action was brought. This local standard was approved by the Supreme Court of Virginia in *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972); and again in *Price* v. *Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972).

In petitioner's brief it was specifically urged that the use of the local community standard by Virginia rather than a state-wide or national standard violated the Constitution. See Petitioner's Brief pgs. 14-18. This issue was also crystalized in the Questions Presented. See Petitioner's Brief pg. 2. The petitioner's argument was discussed in the respondent's brief pgs. 8 and 9. In addition, both parties addressed themselves to this issue during oral argument before this Court on October 19, 1972.

The *Per Curiam* opinion of this Court rendered on June 25, 1973, vacates the judgment of the Supreme Court of Virginia and remands the case for further proceedings consistent with *Miller* v. *California*, ... U.S. ....., 13 Cr. L. 3161 (1973), and other cases rendered at the same time and similarly considering the question of obscenity.

In *Miller* this Court specifically rejected the notion that a state was required to structure obscenity proceedings around evidence of a *national* "community standard." The majority found that the contemporary standards of the State of California was constitutionally adequate. However,

it is unclear whether Your Honors approved the *local* community standard applied in this case. There is language in *Miller* which is susceptible of interpretation that the majority did in fact approve a local standard, and there is other language which can be read to mandate that only a state-wide standard is constitutionally permissible. The Court's use of the following language tends to support the constitutionality of a local standard:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (..... U.S. ....., 13 Cr. L. at 3166).

In this quoted material, the Court has spoken in terms of both states and localities. The majority has also referred to "local" community standards in footnote 13, in that case. It would also appear that the Court has approved a local standard when it recognized that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community. . . ." 13 Cr. L. at 3165.

On the other hand, the Court utilizes additional language which seems to indicate that the standard to be applied is that of the entire state:

> "Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for

> all 50 States in a single formulation, even assuming the prerequisite consensus exists." (13 Cr. L. at 3165).

The majority opinion also said that, "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 13 Cr. L. at 3166.

The Commonwealth of Virginia submits that the language in *Miller* is not free from doubt as to the permissible use of a local standard as required by the Virginia statute and interpreted by the Supreme Court of Virginia. It is earnestly requested that the Court clarify the standard which can be used in determining obscenity, and remove any ambiguity concerning the utilization of a local standard. This precise issue was fairly and clearly presented to the Court in this case, and the resolution of this issue now can forestall further needless litigation on this issue. It appears that at least seven other states also utilize the local standard. *Gornto* v. *State*, 178 S.E.2d 894 (Ga. 1970), cert. den. 402 U.S. 933 (1972); *People* v. *Bloss*, 27 Mich. App. 687, 184 N.W.2d 299 (1970), vacated on other grounds, 201 N.W.2d 806 (1972); *McKinney* v. *State*, 254 So.2d 714 (1971), cert. den. 405 U.S. 1075 (1972); *Gent* v. *State*, 393 S.W.2d 219 (Ark. 1965); Rev. on other grounds 386 U.S. 767 (1967); *State* v. *Henry*, 198 So.2d 889 (La. 1967), rev. on other grounds 392 U.S. 655 (1968); *Davidson* v. *State*, 251 So.2d 841 (Fla. 1971), appeal pending; *State* v. *Miller*, 112 S.E.2d 472 (W.Va. 1960).

To leave this matter in a state of limbo will only prove to be disruptive and vexatious to state courts and this Court by needless and repetitious litigation.

CONCLUSION

For the reasons set forth it is submitted that this Court should clearly and unequivocally resolve the issue as to whether a local community standard in determining obscenity is constitutionally permissible.

Respectfully submitted,

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SPECIAL CERTIFICATE

I, James E. Kulp, a member of the Bar of the Supreme Court of the United States, pursuant to Rule 58 do hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

JAMES E. KULP
Assistant Attorney General

CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, of counsel for the respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 13th day of July, 1973, I mailed 3 copies of the foregoing to Stanley M. Dietz, Esquire, 1029 Vermont Avenue, N.W., Washington, D.C. 20005, counsel for Petitioners.

JAMES E. KULP
Assistant Attorney General